Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of 1993 Annual Access Tariff Filings	)	CC Docket No. 93-193, Phase I, Part 2
GSF Order Compliance Filings	)	
In the Matter of 1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
In the Matter of 1995 Annual Access Tariff Filings	)	
In the Matter of 1996 Annual Access Tariff Filings	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 25, 1997 **Released:** June 25, 1997

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a Petition for Clarification filed by Bell Atlantic Corp. (Bell Atlantic) of the Commission's *1993-1996 Annual Access Order*.[1] We determine that Bell Atlantic and Pacific Bell may not, in connection with refunds ordered for the common line basket, increase price cap indices (PCIs) for other baskets to account for previous misallocation of sharing obligations among baskets. We also determine that carriers, at their option, may use either Bell Atlantic's proposed method for calculating indices, which incorporates all tariff filings within a year, or the method set out in the *1993-1996 Annual Access Order*, which relies on beginning and midyear checkpoints. We also

[1] In re 1993 Annual Access Tariff Filings; GSF Order Compliance Filings; 1994 Annual Access Tariff Filings; 1995 Annual Access Tariff Filings; 1996 Annual Access Tariff Filings, CC Docket No. 93-129, Phase I, Part 2 and CC Docket No. 94-65, Memorandum Opinion and Order, FCC 97-139 (rel. April 17, 1997) (*1993-96 Annual Access Tariff Order*).

correct a typographical error in paragraph 105, Step 3, of the *1993-1996 Annual Access Order*. Finally, we determine that Roseville Telephone Company (Roseville) properly determined its refund obligation under the *1993-1996 Annual Access Order*.

II. PETITION FOR CLARIFICATION

A. Background

2. In the *1992 Annual Access Order*, the Bureau set forth, *inter alia*, the methodology to be used by incumbent local exchange carriers (LECs) subject to price cap regulation to allocate their sharing allocations among baskets.[2] The Bureau stated that LECs should allocate sharing obligations among baskets on a cost causative basis. The Bureau also found that because rates are set based on costs, LECs could use basket revenues as a proxy for basket costs in determining the allocation of sharing among baskets.[3] The Bureau required that LECs allocate their adjustments to all price cap baskets based on the proportion of "total revenue in each basket" to total interstate revenue.[4]

3. The *1993 Annual Access Order*[5] set for investigation, *inter alia*, the issue of whether the Bell Atlantic Telephone Companies (Bell Atlantic)[6] could exclude end-user charge revenues from the common line basket for purposes of allocating sharing obligations.[7] Bell Atlantic and Pacific Bell argued that end-user revenues should be removed from the common line basket before a carrier calculates the basket revenue allocators (each basket's revenue as a

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[2] In the Matter of 1992 Annual Access Tariff Filings, National Exchange Carrier Association, Universal Service Fund and Lifeline Assistance Rates, CC Docket No. 92-141, Memorandum Opinion and Order, 7 FCC Rcd 4731, 4732-33 (rel. June 22, 1992) (*1992 Annual Access Order*).

[3] *1992 Annual Access Order*, at 4732, n.4.

[4] *1992 Annual Access Order*, at 4732-33.

[5] In re 1993 Annual Access Tariff Filings; National Exchange Carrier Association Universal Service Fund and Lifeline Assistance Rates; GSF Order Compliance Filings; Bell Operating Companies' Tariff for the 800 Service Management System and 800 Data Base Access Tariffs, CC Docket Nos. 93-129 and 86-10, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, 8 FCC Rcd 4960 (rel. June 23, 1993) (*1993 Annual Access Order*).

[6] The Bell Atlantic telephone companies are Bell Atlantic-Delaware, Inc; Bell Atlantic-Maryland, Inc; Bell Atlantic-New Jersey, Inc; Bell Atlantic-Pennsylvania, Inc; Bell Atlantic-Virginia, Inc; Bell Atlantic-Washington, D.C., Inc; and Bell Atlantic-West Virginia, Inc.

[7] *1993-96 Annual Access Tariff Order* at ¶ 3. Pacific Bell used the same methodology as Bell Atlantic for its 1994, 1995, and 1996 annual access tariff filings. *1993-96 Annual Access Tariff Order* at ¶ 40.

percent of the total revenue) used to allocate sharing among baskets.[8] They maintained that a sharing obligation for end-user charges is irrelevant because those charges are designed to earn a net return of 11.25 percent, whereas sharing is based on earnings in excess of 12.25 percent.

4. In the *1993-96 Annual Access Order*, the Commission rejected Bell Atlantic's and Pacific Bell's contention that end-user common line (EUCL) revenues may be excluded for purposes of allocating sharing amounts among price cap baskets.[9] Section 61.45(d)(4) of the Commission's Rules provides that exogenous cost changes should be allocated among price cap baskets on a cost-causative basis.[10] The Commission found that when LECs use basket revenues as a proxy for costs, excluding EUCL revenues from the common line basket would distort the use of these revenues as a proxy for costs because total revenues would not be used. The Commission held that Bell Atlantic, for its 1993 through 1996 annual access tariff filings, and Pacific Bell, for its 1994 through 1996 annual access tariff filings, incorrectly allocated their sharing obligations among the various service baskets by excluding EUCL revenues from their calculations. Bell Atlantic and Pacific Bell were ordered to correct how they allocated their sharing adjustments among baskets, and to revise their price cap indices, the upper limits on the service band indices in the service categories and subcategories, and the maximum carrier common line rates, and to implement refunds for those baskets where the corrected PCI was lower than what had been charged to customers during the relevant period.[11] On May 8, 1997, Bell Atlantic and Pacific Bell filed their revised 1997 Tariff Review Plans (TRPs), incorporating, in part, the instructions set out in the *1993-96 Annual Access Order*, but also incorporating rate increases to other baskets to offset the refund to the common line basket. The Commission delegated to the Common Carrier Bureau (Bureau) authority to resolve further issues concerning the implementation of refunds.[12] On May 19, 1997, Bell Atlantic filed a Petition for Clarification (Petition)

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[8] *1993-96 Annual Access Tariff Order* at ¶ 37.

[9] *1993-96 Annual Access Tariff Order* at ¶¶ 37-38. In its Petition for Clarification, Bell Atlantic states that its 1993 annual tariff filing allocated sharing among baskets based upon the revenues in those baskets consistent with the cost causation principles enunciated in the *1992 Annual Access Order*. In performing this calculation, however, Bell Atlantic and Pacific Bell excluded EUCL revenues from the amount of revenue assigned to the common line basket. Bell Atlantic argues that because EUCL revenues are based solely on a forecasted revenue requirement as opposed to PCIs or productivity adjustments, EUCL revenues should be excluded from any sharing calculation. Bell Atlantic Petition at 3. Neither Bell Atlantic nor Pacific Bell, however, have asked us to reconsider the specific issue of whether the carriers improperly removed EUCL revenues in calculating sharing allocations.

[10] Section 61.45(d)(4) of the Commission's Rules, 47 C.F.R. § 61.45(d)(4).

[11] *1993-96 Annual Access Tariff Order* at ¶ 39.

[12] *1993-96 Annual Access Tariff Order* at ¶¶ 50, 96.

requesting the Commission to clarify the *1993-96 Annual Access Tariff Order* regarding the calculations necessary to correct the allocation of sharing among price cap baskets.[13]

B. Pleadings

5. In its petition, Bell Atlantic states that while the *1993-96 Annual Access Tariff Order* addresses the procedures to reallocate sharing to the common line basket (thereby reducing the price cap indices for that basket), it fails to address the procedure to reallocate sharing from the other baskets (thereby increasing the price cap indices for those baskets). According to Bell Atlantic and Pacific Bell, the issue requiring clarification is not the total amount of their sharing obligations, but the method to be used to distribute those sharing obligations among the various price cap baskets.[14] They assert that to correct the allocation of sharing, the carriers argue, the indices for *all* of the baskets must be recalculated to reflect the allocation method in the *1993-96 Access Tariff Order*. These carriers argue that lowering indices for the common line basket without correspondingly raising the other baskets would not "correct" how the carriers allocated their sharing adjustment among the baskets. If Bell Atlantic and Pacific Bell are not allowed to offset the refund to the common line basket by raising rates in the remaining baskets, their total sharing for the years in question would be increased beyond what is required under the price cap rules, penalizing them and providing a windfall to their access customers.[15]

6. Bell Atlantic also states that section V of the *1993-96 Access Tariff Order* erroneously requires carriers to adjust their PCIs permanently. Bell Atlantic argues that such an adjustment is inconsistent with the Commission's price cap rules, which treat sharing as a one-time event that "must not have an impact beyond a single year."[16] A price cap index lowered to reflect the sharing obligation for a given year is raised back up the following year, and that reduction is never embedded in the permanent price cap index, according to Bell Atlantic. Bell Atlantic also argues that the requirement that the carriers recalculate their indices at the "beginning and middle of each year"[17] would skip any tariff filings made in the interim, and distort the results. Bell Atlantic also requests that paragraph 105, Step 3 be corrected to state "ratio of revenue in 1997, the last year of this investigation, to the base year

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[13] On May 27, 1997 Pacific Bell filed a reply in support of the petition and on June 4, 1997, AT&T Corp. (AT&T) and MCI Telecommunications Corporation (MCI) filed comments opposing the petition. Bell Atlantic filed a reply (Reply) to those Oppositions on June 6, 1997.

[14] Pacific Bell Reply at 3; Bell Atlantic Petition at 2.

[15] Bell Atlantic Petition at 8-9; Pacific Bell Reply at 5.

[16] Bell Atlantic Petition at 7.

[17] *See 1993-96 Annual Access Order* at ¶ 98.

revenue," instead of citing the year 1993.[18]

7. MCI and AT&T argue that the intent of the *1993-96 Access Tariff Order* was clear -- the Order required a PCI adjustment only in the common line basket.[19] Bell Atlantic, according to MCI, is seeking only to avoid its refund obligation. MCI also contends that Bell Atlantic's proposed methodology is prohibited by the price cap rules because LECs may not carry forward unused headroom from one year to the next.[20] MCI contends that the Commission should reject the proposed methodology of Bell Atlantic and Pacific Bell because it allows them to carry forward unused headroom, in violation of our price cap rules.

8. MCI and AT&T further contend that Bell Atlantic's proposed methodology violates the filed rate doctrine by retroactively raising rates for services in the traffic sensitive, trunking, and interexchange baskets. They argue that the filed rate doctrine requires that a carrier may only charge the rates covered by its tariff on file and in effect at a particular time, and that such rates cannot be increased retroactively. MCI and AT&T argue that they may be subject to the proposed retroactive charges because they had no notice that they might be subject to future rate increases on account of sharing misallocations by Bell Atlantic and Pacific Bell. According to MCI, Bell Atlantic mischaracterizes the *1993 Annual Access Order*, in that the *1993 Annual Access Order* contains no suggestion that carrying forward past headroom was contemplated, or that the traffic sensitive, trunking, and interexchange rates could be increased retroactively upon the conclusion of the investigation.[21] MCI argues that when the Commission does provide for a retroactive rate increase, it does so explicitly by indicating that rates are interim and subject to true-up, and by invoking its authority under section 4(i) of the Act.[22]

9. AT&T argues that, because of changes in the mix of services that customers order, there is no assurance that ratepayers that were shortchanged by Bell Atlantic's past

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[18] Bell Atlantic Petition at 7.

[19] MCI Opposition at 7; AT&T Opposition at 4 (Bell Atlantic's proposed methodology is contradictory to the *1993-96 Access Tariff Order*, which explicitly rejected adjustment as proposed by Bell Atlantic).

[20] MCI Opposition at 10.

[21] MCI Opposition at 13-14.

[22] MCI Opposition at 15, n.29 (*citing* In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, First Report and Order, 8 FCC Rcd 8344, 8360 (rel. Nov. 12, 1993); In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) at ¶ 1067.

underallocation of sharing to the Common Line basket would be made whole.[23] AT&T contends that Bell Atlantic made a voluntary business decision to exclude EUCL revenues in calculating its sharing distribution for several years, precluding its present claim that its customers owe Bell Atlantic a refund.[24]

10. In response to Bell Atlantic's request to correct paragraph 105, Step 3, MCI argues that Step 3 of the refund methodology should be eliminated, rather than corrected. Elimination of this step, argues MCI, is warranted because adjustment for revenue changes between the base year and 1997 is unnecessary. Refund liability should be based on the actual amount of overcharges (Step 2) plus interest (Steps 4 and 5).

11. In reply comments, Bell Atlantic argues that there is no violation of the filed rate doctrine if the parties were put on contemporaneous notice that the adjustment was contemplated. That contemporaneous notice, argues Bell Atlantic, came in the *1993 Annual Access Order*, where the Commission stated that it was evaluating the distribution of sharing to all baskets, and that any adjustment would have an impact beyond a single basket.[25] Bell Atlantic refutes MCI's argument that the notice was inadequate by arguing that the Commission made no statements about specific rates being subject to a true-up, because the Commission was evaluating the level of PCIs for all of the various baskets, and not a specific rate.

12. Bell Atlantic distinguishes the two Commission decisions cited by MCI, in which the Commission found that where a reduction in rates (or indices) had been ordered, carriers could not take prospective advantage of headroom they had foregone in the past.[26] Bell Atlantic argues that it is not seeking to make a prospective adjustment for past headroom it had voluntarily foregone, but rather the adjustment required by the Commission only now creates the headroom in some baskets. Bell Atlantic also argues that the decision in *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), is also inapplicable because it involved a carrier attempting to offset a refund with an unrelated rate increase.

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[23] AT&T Opposition at 5. In fact, according to MCI, Bell Atlantic's methodology would do more than offset the common line basket, as in some years the exogenous cost increases in the other baskets would be greater than required common line basket refund. MCI Opposition at 16.

[24] *See also* MCI Opposition at 21-22 (refund is not a penalty because improper allocation in violation of Bureau Order was Bell Atlantic's choice).

[25] Bell Atlantic Reply at 3-4.

[26] In re 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket No. 93-129, Order on Reconsideration FCC 97-135 (rel. April 14, 1997) (*800 Data Base Reconsideration Order*); American Television Relay, Inc., Memorandum and Order, 67 FCC.2d 703 (rel. Feb. 28, 1978) (*American Television Relay*).

13. Regarding MCI's argument to eliminate Step 3 of the Commission's methodology, Bell Atlantic contends that this would not work, because this would leave no method to bring forward the sharing from past years into the current price cap formula. Bell Atlantic contends that the confusion stems from a typographical error that should be corrected, without any further modification.

B. Discussion

14. In the *1993-1996 Annual Access Order*, the Commission directed Bell Atlantic and Pacific Bell to recalculate their various basket pricing limits and to make refunds when the recalculated pricing limits were less than what Bell Atlantic and Pacific Bell actually charged for the time periods in question.[27] This was the case for the common line basket and these carriers are required to implement a refund for that basket, as they propose in their refund plans. The *1993-1996 Annual Access Order*, however, did not specify that carriers would be entitled to raise rates if a revised basket pricing limit was higher than what was actually charged. Nothing in the Commission's order supports a conclusion that rate increases were contemplated as a result of the Commission's decision. Accordingly, we conclude that Bell Atlantic's and Pacific Bell's proposed rate increases as set out in their revised TRPs violate the *1993-96 Annual Access Order*.

15. The Commission has addressed a similar situation in the *800 Data Base Reconsideration*. There, carriers requested that they be permitted to offset decreases in some baskets with rate increases in others because, they argued, if the agency had provided guidance earlier they could have avoided certain exogenous adjustments and could have lawfully recovered undercharges elsewhere. The Commission, however, rejected the requested offsets and applied the longstanding policy that carriers cannot generally recoup past undercharges by prospective rate increases.[28] The Commission relied on the reasoning of the Supreme Court in *FPC v. Tennessee Gas Transmission Co.*, which held that "[t]he company's losses in the first instance do not justify its illegal gain in the latter. . . . The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . shoulder the hazards incident to its actions including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."[29]

16. The Bureau's *1992 Annual Access Order* clearly stated that carriers must allocate sharing on the basis of "total basket revenues." Bell Atlantic and Pacific Bell chose

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[27] *1993-96 Annual Access Order* at ¶¶ 39, 104-106.

[28] *See 800 Data Base Reconsideration Order*, at ¶ 17 (*citing American Television Relay*, 67 FCC.2d at 710-711 and *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. at 152-53 (1962)).

[29] *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. at 152-53.

to disregard this directive when they excluded EUCL revenues in calculating how they would allocate sharing amounts among price cap baskets. And for every year in which Bell Atlantic and Pacific Bell made this allocation, the Bureau found a substantial question of unlawfulness and set the matter for investigation. Thus, Bell Atlantic and Pacific Bell were clearly on notice that their allocation method was potentially unlawful. These carriers assumed any risk of a refund, and had no reasonable basis to assume that they would be entitled to make up undercharges to customers through prospective rate increases caused by their misallocation of sharing. Therefore, we find that a balancing of customer and carrier interests favors the customer in this instance. We are unpersuaded by Bell Atlantic's general assertions that the policy of *FPC v. Tennessee Gas Transmission Co.* should not be applied in this instance. We conclude that the holding of *FPC v. Tennessee Gas Transmission Co.* is fully applicable in this instance and there are no equities in this instance that would cause us to depart from it. Accordingly, Bell Atlantic and Pacific Bell may not make the proposed offsets.

17. We recognize that considerations in the present case different from those addressed by the Commission in the *800 Data Base Reconsideration.* For example, it is true that a corrected sharing allocation for all baskets would mean that some basket indices should rise if others fall. And Bell Atlantic argues that it would be unfair not to allow the offsets because the total amount of sharing is not at issue. As Bell Atlantic concedes, however, ordering refunds in a section 204 investigation is generally within the Commission's discretion.[30] Further, in setting standards for the ordering refunds, we have stated that

> [R]efunds are largely a matter of equity, and in arriving at a decision as to whether or not refunds should be awarded, we must balance the interests of both the carrier and the customer in determining the public interest. In addition, each case must be examined in light of its own particular circumstances.[31]

18. We do not find that the equities or balancing of interests in this case support the proposed offsets. While some of the customers of Bell Atlantic and Pacific Bell benefitted from the greater percentage of sharing amounts allocated to the other baskets attributable to these carriers' sharing misallocation, there is no guarantee that those customers that benefitted from the reduced rates arising from the misallocation would be the same ratepayers paying the proposed offset because of the constantly changing market place. The proposal of Bell Atlantic and Pacific Bell could thus have the effect of penalizing some ratepayers for its incorrect allocation of sharing. Further, contrary to assertions of Bell Atlantic and Pacific Bell, nothing in our previous designation orders covering this issue places

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[30] Section 204(a) of the Telecommunications Act of 1934, as amended. *See also Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975); *AT&T v. FCC*, 487 F.2d 864, 880 (2nd Cir. 1973).

[31] *American Television Relay*, 67 FCC.2d at 708-809.

customers on notice that they could be subject to prospective rate increases on account of sharing misallocations.

19. We agree with Bell Atlantic that the refund required for the 1997-98 access year should not affect the carrier's PCIs permanently because exogenous adjustments arising from sharing are removed the following year. As we stated in the *LEC Price Cap Order*, under the sharing adjustment mechanism, "[t]he customer share plus interest will be returned in the form of a one-time reduction in the PCI for the next rate period, calculated in the same manner as other exogenous changes in the formula."[32] We therefore clarify the directions in Subsection B of the *1993-96 Annual Access Tariff Order* to the extent necessary to assure that the required refund shall be effectuated through a one-time exogenous adjustment that shall be reversed out in the 1998 annual access filing.

20. In ordering carriers to calculate indices using beginning and midyear checkpoints, the Commission was providing a less burdensome means of determining indices for a given time period. We agree, however, with Bell Atlantic that carriers should be able to use the more refined method for calculating indices proposed by Bell Atlantic and find that carriers may take into account tariff filings made in the interim period if they choose to do so. Therefore, we clarify paragraph 98 of the *1993-96 Annual Access Order* by stating that carriers may choose to calculate their indices using either the beginning and midyear check points, or by using every change to the PCI, SBI upper limit, and maximum CCL rate as it occurred throughout the tariff year.

21. Finally, we agree with Bell Atlantic that the *1993-1996 Annual Access Tariff Order* contains a typographical error in paragraph 105, Step 3. Step 3 should read as follows:

> 3) multiply each amount calculated in Step 2 by the relevant basket, service category or subcategory ratio of revenue in 1997, the last year of this investigation, to the base year revenue to reflect the change in index value over time.

Accordingly, we correct paragraph 105, Step 3. We reject MCI's request that Step 3 be eliminated because this step is necessary to bring forward sharing from past years into the price cap formula.

III. Roseville's Cash Working Capital Calculation

22. In the *1993-1996 Annual Access Tariff Order*, the Commission determined that

[32] Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6801 (1990) (*LEC Price Cap Order*).

Roseville's lead-lag study in connection with its 1993 annual access tariff filing was flawed,[33] and ordered Roseville to implement refunds.[34] AT&T argues that Roseville's Refund Plan improperly calculated the refund by not using Roseville's total revenues from all service categories in calculating the refund and therefore that Roseville's access tariff, effective July 1, 1997, should be suspended and investigated.[35] In its reply to AT&T's comments, Roseville argues that the Commission only suspended and set for investigation Roseville's traffic sensitive access charge filing, and thus the rates at issue are only those for Roseville's traffic sensitive switched and special access services. We agree with Roseville that our investigation concerned only Roseville's traffic sensitive access charge filing and special access services. Because only those charges are at issue, we find that Roseville correctly determined the refund amount.

IV. ORDERING CLAUSES

23. Accordingly, it is ORDERED, that the Petition for Clarification filed by Bell Atlantic Corp. is GRANTED to the extent discussed above, but is otherwise DENIED.

24. It is further ORDERED, that Bell Atlantic and Pacific Bell shall filed revised tariffs June 30, 1997 in accordance with the determinations discussed above.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Common Carrier Bureau

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[33] *1993-1996 Annual Access Tariff Order*, at ¶¶ 67-70.

[34] *1993-1996 Annual Access Tariff Order*, at ¶¶ 70, 107. Specifically the Commission ordered Roseville to utilize the standard 15-day allowance method to calculate its cash working capital. We stated that to determine the carrier's working capital allowance under the standard 15-day allowance method,

> the carrier's total annual cash operating expenses are divided by 365 days to determine the average daily cash operating expenses. A carrier's average daily cash operating expenses are then multiplied by the standard cash working capital allowance of 15 days to derive its cash working capital determination.

Id. at ¶ 70.

[35] On May 19, 1997, AT&T filed comments concerning the amended 1997 Tariff Review Plans in CC Docket No. 93-193. In response to comments concerning its Refund Plan, Roseville filed reply comments on May 30, 1997.